UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17, OVERLAND PARK OFFICE

Conco Quarries, Inc.,	**)**	
Employer,	**)**	
and	**)**	
	)	**Case No. 14-RC-267769**
Heavy Construction Laborers'	**)**	
Local No. 663,	**)**	
the Petitioner.	**)**	

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

Submitted by:

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I. Introduction

On October 20, 2020, Heavy Construction Laborers' Local #663 ("Petitioner") filed an RC Petition to represent a unit of six employees performing work for Conco Quarries, Inc. (d/b/a, Conco Companies) ("Employer").

A hearing was held on November 16, 2020 to address various alleged issues raised by the Employer. Post-hearing briefs were submitted on November 24, 2020.

On December 15, 2020, the Acting Regional Director William Cowen ("Regional Director" or "Acting Regional Director") issued a Decision and Direction of Election ("Decision") ordering a mail ballot election with votes to be tallied on January 19, 2021 at 2 P.M.

At 1:30 PM on January 19, 2021, the Employer filed *Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election* ("Request for Review"), in which it argued against every issue decided upon in the Decision and requested impoundment of the ballots that were set to be counted thirty minutes after the filing of its Request for Review.

Pursuant to Section 102.67(d) of the Board's Rules and Regulations, the Employer may file a request for review where "compelling reasons exist therefor." Pursuant to Section 102.67(f), any party may file a statement in opposition to a party's request for review.

Petitioner, by and through the undersigned counsel, files *Petitioner's Opposition to Employer's Request for Review*, and in support thereof, states as follows:

II. Petitioner's Response to Employer's Non-Substantive Fact Issues

The Employer's opening argument in its Request for Review begins by presenting to the Board "Preliminary Incorrect Findings of Fact."

The Employer does not request the Board to provide any relief related to these alleged "incorrect findings of fact."

In fact, the only purported purpose of including such alleged errors, at least according to the Employer's Request for Review, is to "set[] the table" for challenging more substantive findings.

Because these alleged errors are not substantive and because the Employer has alleged no harm or prejudice caused by the alleged errors relative to the issues which were in controversy during the hearing, we respectfully ask the Board to take no action upon the alleged incorrect findings.

III. Petitioner's Response to Employer's Non-Substantive Legal and Factual Arguments

The Employer's next sequence of arguments challenges all four issues that there were in controversy and decided upon by the Acting Regional Director. Although the Employer takes issue with every part of the Decision, not any of the arguments raised by the Employer are compelling.

Section 102.67(d) requires "compelling reasons" to exist before it will grant review of the a Regional Director's Decision and Direction of Election. A compelling reason exists if there is a *substantial* question of law or policy or the existence of a *substantial* factual issue. The law further provides that a legal error may be substantial because of an absence of Board precedent or a departure from Board precedent, and a fact error may be substantial if it touches on a substantial factual issue that is "clearly erroneous on the record" and "prejudicially affects the rights of a party."

Simply put, the Employer raises no compelling reasons that exist to grant review.

There are No Compelling Reasons to Grant Review of the Decision that the Employer Failed to Prove Supervisory Status.

The Employer's first argument is that it was error for the Regional Director to conclude Mr. Shoemaker is not a statutory supervisor.

The Employer alleges that Mr. Shoemaker is a statutory supervisor because he allegedly "assigned" or "responsibly directed" employees in a manner that was not merely routine or clerical but required the use of independent judgment. But beyond that conclusory assertion, the Employer fails to fully develop the legal standards required to establish whether an employee "assigns" or "responsibly directs" work within the meaning of the Act. Without a clear understanding of the legal burden that must be proven to show one's statutory supervisor status, the Employer has no objective means by which it can assess the factual record.

The most compelling example of the Employer's failure to develop the law is with respect to the Employer's failure to recognize that portion of the Regional Director's Decision, which states:

> For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, *and* that there is a 'prospect of adverse consequences' for others' deficiencies. Community Education Centers, Inc., 360 NLRB 85-86 (2014); Oakwood, 348 NLRB at 691-92, 695.
>
> …
>
> [T]he record evidence is absent of any evidence showing that Shoemaker provides feedback to Tennis or upper management regarding the deficient performance of other employees. The Employer has not established that Shoemaker is *accountable* for his actions in directing the petitioned-for-employees. In this regard, the record is absent of any evidence showing that Shoemaker has suffered any adverse consequences such as discipline concerning the deficient performance of any

> employees. Additionally, there is no evidence that General Superintendent Tennis or anyone else in management has advised Shoemaker he will or even may be subject to consequences himself concerning deficiencies and errors of other employees. In sum, the overall record does not demonstrate that the Employer has *actually* held Shoemaker accountable or has imparted clear and formal notice to him that he will be held accountable for the job performance of any employees. See, *Golden Crest*, supra at 731. Thus, I find that the Employer has not met its burden to establish that Shoemaker responsibly directs employees as contemplated by *Oakwood*."
>
> (Decision, p. 14) (footnotes omitted).

None of the Employer's 30 bullet points reflect that Mr. Shoemaker would be held accountable for the successes or failures of the employees for whom he allegedly supervises. Therefore, the Employer's arguments are unfounded and inconsistent with existing Board precedent.

Petitioner's post-hearing brief also made this point, "The Employer never introduced any testimony about whether Mr. Shoemaker could be subject to discipline, terminated, promoted, etc based on the universal crew's performance. The Employer never discussed benchmarks that Mr. Shoemaker was instructed to achieve or even any goals (other than hoping that employees don't 'rebel' when General Superintendent Tennis is not there in person. (Tr. 164, L. 10))."

Similarly, the Employer fails to establish why the Regional Director's Decision regarding "assignment of work" departs from past Board precedent. Instead of focusing on what the law requires and citing to facts that squarely fit within its required burden, the Employer provides a lengthy mix of facts and arguments that are not clearly relevant.

For example, the Employer's most well-developed factual argument is a one-page description of the geographic separation between the rural quarries that is at best circumstantial proof of supervisory status, and at worse, is misrepresentative of the factual record. The Employer describes the geographic distance between eight of its rural quarries and explains how one *must* infer supervisory status from geographic separation. However, the Employer does not explain the nexus that links their factual argument with the relevant legal standards other than to circumstantially infer that this somehow means the supervisor must assign or responsibly direct employees. This is circumstantial at best and the reason that it misrepresents the factual record is that the Employer does not have eight active quarries. (Tr. 100, ln 13-25) (Employer's Ex. 11). The record evidence shows that the bargaining unit has only visited three quarries, and therefore the overdramatic mosaic of eight geographically scattered quarries is not an accurate picture of how the company currently operates. See Employer's Ex. 11.

The remaining facts cited by the Employer are unaccompanied by any explanation of how or why these facts establish that the Employer met its legal burden or how or why the Regional Director's conclusions were erroneous. For that reason, they should be disregarded.

The Employer also critiques the Regional Director for not having adequately distinguished (to its satisfaction) two Board cases that date back to the 1950s, *Alliance Sand Company*, 107 NLRB 1273 (1954) and *United States Gypsum Company*, 116 NLRB 638 (1956).

The Employer recognizes that these cases are at least somewhat distinguishable from the factual record because the supervisor in those cases had discretion and authority to hire and discharge or to effectively recommend changes in the status of crew members, where here, there is no such authority of the alleged supervisor. The Employer also concedes that the cases are distinguishable because the supervisor in *United States Gypsum* performed bargaining unit work

half of the time and supervisor work half of the time. Here, however, the alleged supervisor spends, at most, 20 percent of his time performing lead duties and 80 percent of his time performing bargaining unit work.

However, the Employer stands his ground and argues that the cases are actually very similar because "Mr. Shoemaker is 'regarded as [a] supervisor[] by the employees working under him" (see Tr. 163), and 'd[oes] not report to the same management individual[s] as other employees" (i.e., Mr. Shoemaker reports to Mr. Tennis and ultimately Mr. Upp (Er. Ex. 5), with the 'other employees' reporting Mr. Shoemaker, and then to Mr. Tennis)."

The Employer's citation to Exhibit 5 is misplaced because Exhibit 5 does *not* show Mr. Shoemaker having to report to different management employees as compared to other bargaining unit employees. Despite the Employer's assertion to the contrary, Exhibit 5 identifies Mr. Shoemaker as a member of the Universal Crew, and it does not describe Mr. Shoemaker as a "supervisor." By contrast, Exhibit 5 identifies supervisory employees at the Galloway Quarry and Willard Quarry with a "supervisor" label. Furthermore, Exhibit 5 does not show that employees of the Universal Crew report to separate management. It shows that all members of the Universal Crew, *including Mr. Shoemaker*, report to Stacey Tennis. The Employer assumes facts outside of evidence by representing to the Board that Exhibit 5 stands for a proposition that it clearly does not.

Furthermore, the only record evidence that the Employer cites to for the proposition that the employees regard Mr. Shoemaker as a supervisor is the *hearsay* testimony of Mr. Tennis who said that unit employees told him that they liked Mr. Shoemaker's representation of them and how he led when Mr. Tennis was not there. That statement, on its own, is not the same as employees saying they considered Mr. Shoemaker to be a "supervisor" as that term is used under the Act.

Moreover, the Employer argued that it would be hearsay for the Petitioner to introduce evidence from union officials about whether the employees considered Mr. Shoemaker to be a supervisor or whether Mr. Shoemaker considered himself to be a supervisor. The Employer's counsel vigorously argued, "He is going into hearsay. The testimony, it is hearsay. What someone said to whomever, we are getting into that, that is totally hearsay." (Tr. 112).

Of course, if hearsay testimony is favorable to the Employer (i.e., when Mr. Tennis states that other unit employees told him they liked Mr. Shoemaker's representation of them, etc), not only does the Employer no longer care that it is hearsay evidence, but in fact, it is heavily relied upon in their attempted effort to distinguish case law and to interject error where none exists.

In any event, such testimony is not the *sine qua non* or *pièce de résistance* for which a determination of whether one is or is not a statutory supervisor is made. The Board always looks to the realities of an employee's actual responsibilities rather than labels or titles given to an alleged supervisor.

For all these reasons, the Employer fails to meet its burden at the hearing and fails to raise compelling grounds to review the Decision.

There are No Compelling Reasons to Grant Review of the Decision that the Existing Complement is Substantial and Representative

Although the Employer concludes that the Regional Director's attempts to distinguish two cases from the 1970s are "weak and unavailing," the Employer does not explain why or how the Regional Director's conclusions are "weak and unavailing." Furthermore, the Employer does not set forth the legal requirements to establish that the doctrine of an expanding unit would necessitate delay or dismissal of the petition for an election.

As stated by the Acting Regional Director's Decision, "the Board in general finds that if approximately 30 percent of the eventual employee complement is employed and 50 percent of

the eventual job classifications are filled, then the employee complement is substantial and representative and an election is appropriate." Furthermore, the Board will only consider expansions that are to take place in the reasonably foreseeable future and not those that are indefinite, speculative or remote in time.

The Employer acknowledges that it will *not* add further job classifications in any future complement. It only disputes that the existing complement of six employees is not representative of the eventual complement and that an election should have been delayed until Spring 2021.

At the hearing, Employer witness Chris Upp provided the following testimony about its timeline for *doubling* the existing complement:

> Q: Okay, would it be fair to say that the goal of attaining ten to twelve employees might take as long as a year, based on your experience with hiring qualified applicants?
>
> A: Based on the previous history of this year, I would say yes.
>
> Q: Okay, and that is just for ten to twelve, possibly, correct?
>
> A: Correct.
>
> (Tr. 89, lns 2-10)

Page 89 of the transcript was conveniently one of the pages that was missing from the Employer's abbreviated copy of the transcript in its Appendix, and as shown above, the same person that the Employer said "know[s] what [he is] talking about" forecasted that it could take up to a full year to *double* the complement – far past the Spring of 2021 date referred to in the Employer's Request for Review. As was noted, the law permits an immediate election where the existing complement is 30% of the eventual complement. Based on the testimony of the

Employer's own witness and the requirements of the law, the Employer's argument is not compelling and raises no substantive issues of law or fact.

The Regional Director made findings consistent with what the law requires and based on the factual record developed by the Employer. The Employer could have provided additional evidence to support its burden, but it cannot now blame the Regional Director for how the Employer's own witnesses testified because it dislikes the result or because it miscomprehends the law.

The Employer's Request for Review is also disingenuous because Employer's counsel objected as "speculative" to any testimony from its witnesses about the Employer's plans for laying off people during the alleged off-season. The Employer thought the following question about its hiring plans was simply too "speculative" to answer:

> Q: So are—are these employees that you would like to have make a career with the company?
>
> A: Yes.
>
> Q: Okay, and so you don't anticipate firing them in the winter, do you?
>
> Mr. King: Objection; speculation.
>
> Hearing Officer Nisly: Sustained.
>
> By Mr. Smith: You haven't – you haven't told any of the employees that they will be terminated at any point in the immediate future, and I am specifically talking about the employees on the Universal Crew, correct?
>
> A: No.

Q: And to your knowledge, to the best of your knowledge, no other employees of Conco Quarries, Inc., has told any members of the Universal Crew, that they will be terminated during the winter; isn't that true?

A: Not to my knowledge.

(Tr. 99-100).

If anticipated firing "at any point in the immediate future" is too speculative of a question to be relied upon as evidence, how can the Employer now claim error with the Regional Director's claim that anticipated hiring in the *distant future* is too speculative or remote in time? The Employer cannot have it both ways.

Furthermore, the Board's legal test requires it to only consider expansions that are to take place in the reasonably foreseeable future and not those that are indefinite, speculative or remote in time. The Employer alleges a Spring 2021 timeframe to expand the complement in its Request for Review; but as was previously established, the record evidence does not support the Employer's claim that hiring is likely to occur within this time frame.

For all these reasons, the Employer raises no compelling grounds that would warrant review of the Decision.

There are No Compelling Reasons to Grant Review of the Decision that the Employer's Operations are Non-Seasonal

The Employer alleges error with the Decision regarding seasonality of its operations, but the Employer does not challenge the Regional Director's findings that the "Employer has not established any fluctuation in the substantial complement of employees year-round… the Employer intends for the petitioned-for employees to work as much as possible at the rural quarries unless they cannot work due to weather. To this end, in the last three months, the Employer has interviewed candidates for hire for the universal crew and extended a job offer to one candidate. The

Employer acknowledges that hiring for the universal crew remains a priority going into the winter months and will be a top priority as Spring nears in March to April 2021. This undercuts the Employer's argument that its rural quarry operations are seasonal."

Instead, the Employer's sole argument is that it was error to compare the quarries being organized with the Employer's Galloway Quarry.[1] The only reason the Galloway Quarry is even mentioned in this Decision is because the Employer's sole documentary exhibit to show seasonality at the quarries being organized was a chart of tonnage of rock sold at the Galloway Quarry. This chart did not show hours worked at the Galloway Quarry, employee fluctuation at the Galloway Quarry, or any task performed at the Galloway Quarry. It also did not show any statistics regarding the quarries that are the subject of the petition for representation. The Employer's witness speculated, however, that there would be a "bigger bell curve with the Rural Quarry operations" as compared to the Galloway Quarry. This insignificant thread of documentary evidence, combined with de minimis supporting testimony, is the sole evidence by which the Employer tethers its claim of error. Simply put, a bigger bell curve of tonnage of rock sold and de minimis supporting testimony does not prove seasonality of an Employer's operations.

For these reasons, the Employer utterly failed to carry its burden during the evidentiary hearing and alleges no compelling reasons to grant its Request for Review.

There are No Compelling Reasons to Grant Review of the Decision to Conduct a Mail Ballot Election

Approximately thirty minutes prior to the mail ballot tally, the Employer filed its Request for Review alleging error in the decision to hold a mail ballot election and requesting impoundment of the ballots.

[1] The Employer also alleges that it is error to compare the Rural Quarries to its Willard Quarry. Petitioner's counsel cannot find any reference to the "Willard Quarry" in the Section of the Decision analyzing the alleged seasonality of the Employer's operations. Therefore, we ask that this aspect of the Employer's request be disregarded.

The Employer's counsel then attempted to shoehorn all the allegations of error that appear in its Request for Review into the mail ballot count video conference. Hearing Officer Nisly correctly cited to § 102.67 which states that a party retains the right to file a request for review of a decision and direction of election more than 10 business days after the decision issues, but the pendency of such a request for review shall not require impoundment of the ballots. She also sent a copy of this requirement to both parties. Simply stated, Hearing Officer Nisly made the proper determination regarding impoundment and cited relevant authority to support her decision.

A quick examination of the Employer's remaining allegations of error shows that they are all without merit.

The first sentence of Section III.D of the Employer's Request for Review complains, "Contrary to what the Acting Regional Director said (Decision, at 19), the Employer did[2] address whether there was a current COVID-19 outbreak at its Rural Quarries…" (citing to portions of hearing Transcript which show that some employees had tested positive for COVID-19 about three or four weeks prior to the hearing)."

However, the actions taken by the Employer do not comply with the guidance of *Aspirus*, which the Acting Regional Director describes as requiring "the employer [to] certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days)."

The Employer failed to submit an affidavit certifying compliance with this requirement and did not certify by affidavit that it would comply with this requirement up to the date of the

[2] The Employer's Request for Review underlines words for emphasis and double-underlines words, presumably for double emphasis.

election itself. The Employer's statement in its Request for Review, submitted 30 minutes prior to the mail ballot tally, that it is "ready and willing to provide information to the Board" is too little, too late.

But even setting this point aside, there were other concerns about holding a manual election. The Employer's next allegation of error is that the *Aspirus* guidelines were not followed due to the Acting Regional Director's statement that the count of new confirmed cases in various counties was "concerning." The Employer is mistaken about what the *Aspirus* guidelines require by focusing only on the Regional Director's comment that the number of new cases are concerning. Decisions regarding whether to hold a manual or mail ballot elections should look at either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher. The Employer focuses only on the first prong, but the Regional Director went further by concluding that the same counties showed more than a 5 percent positivity rate. The Employer alleges no error with this finding, and due to the Employer's own misunderstanding of the *Aspirus* guidelines, the Employer is wrong in its conclusion that the guidelines were "simply not followed."

For these reasons, the Employer's request for a manual ballot election should be denied.

IV. Conclusion

For all the foregoing reasons, the Petitioner respectfully requests that the Board deny the Employer's Request for Review.